

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TRISTAN L.,

Claimant,

OAH No. 2012010029

vs.

INLAND REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge Robert Walker, State of California, Office of Administrative Hearings, heard this matter on March 27, 2012, in San Bernardino, California.

Jennifer Cummings, Program Manager for Fair Hearings and Legal Affairs, Inland Regional Center, represented the service agency.

Gabriele L., claimant's mother, represented the claimant, Tristan L.

The matter was submitted on March 27, 2012.

SUMMARY AND ISSUES

Welfare and Institutions Code section 4648.5, subdivision (a)(3), prohibits regional centers from purchasing educational services for children who are three to 17 years of age.

Code section 4648.5, subdivision (c), provides that, in certain circumstances, a consumer is entitled to an exemption from this prohibition.

Does claimant qualify for an exemption from the prohibition?

In this decision, it is determined that claimant failed to prove that he qualifies for an exemption.

FACTUAL FINDINGS

Background

1. Claimant, Tristan L., is 12 years old. He is autistic, and because of his autism, he is a regional center consumer. The regional center provides claimant with applied behavior analysis (ABA) services and 90 hours per quarter of respite. Claimant also has a diagnosis of oral apraxia. Claimant did not start speaking until he was eight years old, and he continues to have significant speech and language deficits.

2. Claimant attends school at the Christian Academy, a private school.

3. The public school district in which claimant lives is Desert Sands Unified School District (DSUSD). In 2011, claimant's mother had a dispute with DSUSD regarding the services the district should provide for claimant. In November of 2011, claimant's mother and DSUSD entered into a settlement agreement. The district agreed to provide 30 minutes per week of speech and language services through a DSUSD pathologist, who would go to claimant's private school to provide that service, and one hour per week of clinic-based occupational therapy (OT).

4. In December of 2011, claimant's mother requested that the regional center augment claimant's services by providing one hour per week of OT and four hours per week of one-on-one speech therapy. By a notice of proposed action dated December 19, 2011, the regional center notified claimant's mother that the request was denied.

5. Claimant appealed, and his appeal is the subject of the present proceeding. While the request for speech therapy was for four hours a week, the appeal specified that claimant was seeking three hours per week of speech therapy.

6. Before the hearing in this matter, claimant and the regional center entered into a settlement agreement regarding claimant's request for OT. Thus, the only issues remaining concern claimant's request for three hours per week of one-on-one speech therapy.

Claimant Needs More Than 30 Minutes Per Week of One-On-One Speech Therapy

7. Mary Sinclair is a speech and language pathologist. She testified in the hearing by telephone. Ms. Sinclair holds a master's degree from the University of the Pacific. She testified that she has "taken lots of additional training," is "credentialed with all of the credentialing agencies," and has treated children with speech and language problems for 35 years. For one and one-half years, Ms. Sinclair has provided one-on-one speech therapy to claimant twice a week in one hour sessions. Claimant's mother pays Ms. Sinclair.

8. On occasion, Ms. Sinclair has worked with claimant in his home. Usually, however, she goes to his school, the Christian Academy. Ms. Sinclair wrote a report dated

December 10, 2011. Her testimony was similar to the recommendations she made in her report.

9. The following is a paraphrased summary of part of Ms. Sinclair's testimony. Claimant has extreme oral apraxia. It is a tragedy that this has not been addressed before. For years, it never was addressed. It needs to be done. It is a tragedy. He needs a way to communicate, and he is not getting the help. He is 12 years old but has the language ability of a child who is five and one-half years old. He is eager to learn to communicate. He has so much potential, and his mother is very supportive. Without support, he will not get anywhere. He has an iPad, but that is not an appropriate means of communication for him. He needs social skills. We have had some gains, and we need to continue. He needs help from someone trained in the area of receptive planning programming. His condition is severe. He needs intense motor praxis five times a week. An American Speech and Hearing Association (ASHA) white paper recommends three to five times a week. He needs one-hour sessions. Twenty-minute sessions are not long enough. He can handle one-hour sessions without tiring. Everyone in the school says he is blossoming.

10. Douglas Christianson, Jr., is a consumer services coordinator for the regional center. For two years, he has been claimant's services coordinator. Mr. Christianson formerly taught special education students. He was credentialed to teach children with mild to moderate disabilities. When Mr. Christianson taught, he helped to implement students' educational plans, including plans for speech therapy.

11. The following is a paraphrased summary of part of Mr. Christianson's testimony. Communication goals are among the matters addresses in claimant's ABA program, which the regional center funds. In November, I observed one of claimant's speech therapy sessions with Ms. Sinclair. As a teacher, I could have done a lot of what Ms. Sinclair was doing if a speech and language pathologist had provided instruction and guidance for me. Ms. Sinclair may have been effective, but claimant appeared to me to be unable to remain attentive for the entire hour. Perhaps my presence distracted him. Claimant's biggest difficulty is his inability to make friends and interact appropriately.

12. The regional center called Tamara Pattison as an expert witness. Ms. Pattison has been a speech and language pathologist for 22 years. She holds a master's degree and is licensed by the State of California. She also holds a certificate of clinical competence from ASHA, which qualifies her to work as a supervising pathologist. Ms. Pattison works full time as a speech and language pathologist for the Coachella Valley Unified School District. She also has a private practice in which she provides therapy for children up to three years old, and she is a consultant for Coyne and Associates, an ABA provider. Ms. Pattison testified that she reviewed claimant's records but had not met him.

13. Based on her review of claimant's records, Ms. Pattison recommended that a speech and language pathologist consult with claimant's ABA providers to add goals that specifically target articulation and language. The consultant should train in-home tutors and supervisors so that they could target specific sound production and increase awareness of

correct responses. Also, Ms. Pattison recommended that error correction procedures be implemented.

14. The following is a paraphrased summary of part of Ms. Pattison's testimony. Many autistic children have apraxia. Childhood apraxia of speech involves a neurological deficit that interferes with signals from the brain to the oral motor mechanism. It causes children to have problems producing the sounds necessary to say words. Childhood apraxia of speech is not a developmental disorder. Childhood apraxia requires attention over a long period of time. Claimant's records show that, when he was 29 months old, he was diagnosed with apraxia and that he has received intensive therapy for apraxia since that time. One-on-one therapy tends to be most effective with children up to the age of seven years. Because autistic children can have difficulty transferring what they have learned from one setting to another, it is important to teach them in a generalized setting rather than only in a one-on-one setting. Speech therapy is an exact science, and autistic children with speech and language problems need one-on-one therapy in order to acquire new skills. It is also important, however, that parents, teachers, tutors, and other people who have substantial contact with a child be trained to do what needs to be done in order to help the child transfer skills from one setting to another. It is possible that claimant's ABA program could be modified to focus more directly on his speech and language needs. Claimant needs more than 30 minutes per week of one-on-one therapy. Also, there needs to be an expansion of the settings in which claimant has an opportunity to be corrected by people who have been trained.

15. Claimant's mother testified. The following is a paraphrased summary of part of her testimony. Tristan has a one-on-one aid at school. In the past, the school district provided the aid. This year, however, I am paying for the aid. I transport Tristan to and from school. I work on speech goals with him. Janet Weberling, a school district employee, provides the 30 minutes per week of therapy that the school district agreed to provide. Tristan has had nine years of speech therapy, and he is extremely motivated to communicate.

16. The regional center submitted numerous records – including an individual program plan, evaluation reports, assessment reports, progress reports, school district reports, and autism reports.

17. Claimant submitted a school district triennial assessment that was performed in October of 2010. The evaluators reported that, on both receptive and expressive subtests, claimant demonstrated severe deficits in the areas of listening comprehension, use of age-level semantics and syntax, and integrative language skills. The evaluators reported that claimant had only limited or emerging reciprocal social relationships with peers and demonstrated repetitive and stereotypical patterns of behavior. The evaluators concluded that claimant had significant deficits in expressive language, receptive language, articulation, and pragmatics/social communication. The evaluators recommended continued enrollment in speech and language therapy services.

18. Claimant submitted a March 23, 2012, email with excerpts from ASHA policy documents. Regarding childhood apraxia of speech, "there is emerging research support for

the need to provide three to five individual sessions per week for children with apraxia as compared to the traditional, less intensive, one to two sessions per week. [¶] . . . [¶] Although home practice is critical for optimal progress, it cannot take the place of individual treatment provided by a speech-language pathologist who has expertise in motor speech skill facilitation.”

No Evidence that One-On-One Speech Therapy is a Primary or Critical Means

19. The disability that causes claimant to be eligible for regional center services is autism. Claimant failed to prove that one-on-one speech therapy is a *primary or critical means* for ameliorating the physical, cognitive, or psychosocial effects of claimant’s autism. Mr. Christianson testified that the regional center provides ABA services to ameliorate the effects of claimant’s autism, and as one part of those services, the regional center provides a program to address communication goals. From the testimony of the regional center’s expert witness, Ms. Pattison, one can conclude that, in connection with claimant’s ABA services, he needs more than 30 minutes per week of one-on-one speech therapy. But there was no evidence from which one could conclude that one-on-one speech therapy is a *primary or critical means* for ameliorating the physical, cognitive, or psychosocial effects of claimant’s autism. There was no testimony from which one could conclude that. There was no documentary evidence from which one could conclude that.

20. Addressing communication goals is a means for ameliorating effects of claimant’s autism, and in connection with addressing communication goals, claimant needs more than 30 minutes per week of one-on-one speech therapy. On this record, however, it is not possible to make a finding that one-on-one speech therapy is a *primary or critical means* for ameliorating the physical, cognitive, or psychosocial effects of claimant’s autism.

No Risk of an Out-of-Home Placement

21. Claimant’s mother said claimant does not contend that the service is necessary to enable him to remain in his home.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Evidence Code section 500 provides: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” With regard to the issue of whether there is a right to an exemption from the prohibition, claimant has the burden of proof.

2. Evidence Code section 115 provides, in part, “Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.” Thus, the standard of proof in this case is a preponderance of the evidence.

Rule Regarding Admissibility of Evidence

3. This case arises under the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code § 4500, et seq.)¹

4. Code section 4712, subdivision (i), provides, in part, that, in a state level fair hearing, “Any relevant evidence shall be admitted.” Thus, hearsay evidence is admissible and, if it appears to be reliable, may be used to support a finding of fact.

Entitlement to Services and Supports

5. Pursuant to the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (Code § 4501.) Regional centers are charged with the responsibility of carrying out the state’s responsibilities to the developmentally disabled. (Code § 4620, subd. (a).) The Lanterman Act directs regional centers to develop and implement an Individual Program Plan (IPP) for each individual who is eligible for regional center services. (Code § 4646.) The IPP should state the consumer’s goals and objectives and delineate the services and supports the consumer needs. (Code §§ 4646, 4646.5, & 4648.)

Unless a Consumer Qualifies for an Exemption, a Regional Center is Prohibited from Purchasing Certain Services

6. In the Budget Act of 2009, the California Legislature, as a cost-saving measure, placed a number of limitations on the services and supports a regional center can provide. One limitation concerns educational services. A regional center is prohibited from purchasing educational services for children who are from 3 to 17 years of age. An exemption from the prohibitions is available under certain circumstances.

7. Code section 4648.5, subdivision (a), provides, in part, as follows:

Notwithstanding any other provision of law or regulations to the contrary . . . a regional center’s authority to purchase the following services shall be suspended

[¶] . . . [¶]

¹ Unless otherwise specified, all references to the code are to the Welfare and Institutions Code.

(3) Educational services for children three to 17, inclusive, years of age.

Grounds for an Exemption from the Prohibition

8. Code section 4648.5, subdivision (c), provides as follows:

An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that *the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability*, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs. (Italics added.)

9. Claimant's mother said claimant does not contend that the service is necessary to enable him to remain in his home. Thus, in order to qualify for an exemption, claimant must prove that the service is a *primary or critical means* for ameliorating the physical, cognitive, or psychosocial effects of claimant's developmental disability.

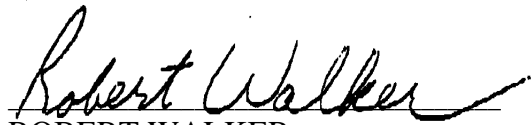
Claimant Failed to Prove that he Qualifies for an Exemption from the Prohibition

10. By reason of the matters set forth in Findings 7 through 20, it is determined that claimant failed to prove that one-on-one speech therapy is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of his autism.

ORDER

The appeal is denied. The regional center's decision not to provide speech therapy is upheld.

DATED:


ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. If a party chooses to appeal, an appeal from this decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)